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NO. 82-6080

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS
Respondent

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

(1) What is the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal Court of Appeals by a death sentenced federal habeas corpus petitioner?

(2) Was Petitioner deprived of due process of law by the prosecution's use of hypothetical questions posed to expert psychiatric witnesses regarding Petitioner's future dangerousness at the punishment phase of his bifurcated trial?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

A. Procedural History 2

B. The Evidence at Petitioner's State Trial 5

1 .The Guilt of Innocence Stage of Trial 5

2 .The Punishment Phase of Trial 11

C. The Evidence at the Federal Evidentiary Hearing 17

SUMMARY OF ARGUMENT 22

A. The Stay Issue 22

B. The Hypothetical Question Issue 25

ARGUMENT 26

I. A STAY OF EXECUTION SHOULD NOT BE GRANTED PENDING THE APPEAL OF A DEATH SENTENCED STATE PRISONER IN FEDERAL HABEAS CORPUS UNLESS HE PRESENTS AN ISSUE WITH A SEMBLANCE OF PATENT SUBSTANTIAL MERIT CREATING A REASONABLE JUDICIAL DOUBT AS TO HIS LIKELIHOOD OF SUCCESS ON APPEAL 26

A .The Statutory Scheme Enacted by Congress Governing Habeas Corpus Appeals Contemplates that a Stay of Execution may be Denied to a Death Sentenced Habeas Corpus Petitioner who has been Granted aCertificate of Probable Cause to Appeal 26

B .This Court's Important Authorities Support the Proposition that the Granting of a Certificate of Probable Cause Should Not Entitle a Death Sentenced Habeas Corpus Petitioner to an Automatic Stay of Execution Pending Appeal 32

C .Considerations of Logic and Equity Militate Against the Granting of Automatic Stays of Execution to Death Sentenced Habeas Corpus Petitioners who have Obtained Certificates of Probable Cause to Appeal 38

II. PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW BY THE USE OF HYPOTHETICAL QUESTIONS POSED BY EXPERT PSYCHIATRIC WITNESSES AT THE PUNISHMENT PHASE OF HIS BIFURCATED CAPITAL TRIAL 40

A. The Texas Statutory Scheme and the Court's Prior Pronouncements Illustrate the Appropriateness of Expert Psychiatric Testimony at the Punishment Phase of a Texas Capital MurderTrial 40

B. Expert Predictions of Future Dangerousness are Reliable in Cases Such as Petitioner's 43

C. The Probative Value of the Expert Testimony in Petitioner's Case was not Outweighed by any Prejudicial Impact 47

CONCLUSION 50

INDEX OF AUTHORITIES

CASES **Page**

Abduc v. Lane, 468 F.Supp. 33 (E.D. Tenn.), aff'd, 588 F.2d 1178 (6th Cir. 1978) 28

Barefoot v. Estelle, _____U.S._____, 103 S.Ct. 841 (1983) 5

Barefoot v. Estelle, 697 F.2d 593 (5th Cir. 1983) ..... *passim*

Barefoot v. Estelle, No. W-81-CA-191 (W.D. Tex. 1982) 1,3,5

Barefoot v. State, 596 S.W.2d 875 (Tex.Crim.App. 1980) 2

Barefoot v. Texas, No. 80-5320, _____U.S._____ (1980) 3

Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982) 37

Brooks v. Estelle, 697 F.2d 586 (5th Cir. 1982) 24,36,37

Buttrum v. Georgia, _____U.S._____, 103 S.Ct. 801 (1983) 44

Carafas v. LaVallee, 391 U.S. 324 (1968) 23,33

Chessman v. Dickson, 275 F.2d 604 (9th Cir. 1960) 28

Clements v. Wainwright, 648 F.2d 979 (5th Cir. 1981) 29

Dobbert v. Strickland, 670 F.2d 938 (5th Cir. 1982) 37

Drummond v. Fulton County Department of Family and Children's Services, 532 F.2d 1001 (5th Cir. 1976) 30

Estelle v. Smith, 451 U.S. 454 (1981) 21,22,26,42,43,44

Evans v. Bennett, 440 U.S. 1301 (1979) 40

Farrell, Ex parte, 189 F.2d 540 (1st Cir.), cert. denied sub nom. *Farrell v. O'Brien*, 342 U.S. 839 (1951) 28

Florida Businessmen for Free Enterprise v. City of Hollywood, 648 F.2d 956 (5th Cir. 1981) 30

Foster v. Field, 413 F.2d 1050 (9th Cir. 1969) 28

Gardner v. Florida, 430 U.S. 349 (1977) 43

Garrison v. Patterson, 391 U.S. 464 (1968) 23,33

Gay v. Graham, 269 F.2d 482 (10th Cir. 1959) 28

Goode v. Wainwright, 670 F.2d 941 (11th Cir. 1982) 37

Gordon v. Secretary of State of Wisconsin, 462 F.Supp. 307 (E.D. Wisc. 1978) 28

Green v. Georgia, 442 U.S. 95 (1979) 43

Gregg v. Georgia, 428 U.S. 153 (1976) 43

Holloway v. State, 613 S.W.2d 497 (Tex.Crim.App. 1981)(*en banc*) 43

Jackson v. South Carolina, 498 F.Supp. 186 (D.S.C. 1979) 28

Jurek v. Texas, 428 U.S. 262 (1976) 26,41,42

Kleczka v. Massachusetts, 259 F.Supp. 462 (D.C. Mass. 1966) 31

Lambert v. Barrett, 159 U.S. 660 (1895) 32

Miller v. Turner, 658 F.2d 348
(5th Cir. 1981) 36

Miranda v. Arizona, 384 U.S. 463 (1966) 42

Modesto v. Nelson, 296 F.Supp. 1375
(N.D. Cal. 1969) 37

Mulligan v. Zant, 531 F.Supp. 458
(M.D. Ga. 1982) 37

Nolan v. Nash, 316 F.2d 776 (8th Cir.),
cert. denied, 375 U.S. 924 (1963) 28

Nowakowski v. Maroney, 386 U.S. 542 (1967) 23,29,33

O'Bryan v. Estelle, 691 F.2d 706
(5th Cir. 1982) 24,30,32,36,37

Page v. United States Parole Commission,
651 F.2d 1083 (5th Cir. 1981) 36

People v. Murtishaw, 631 P.2d 446
(Cal. 1981)(*en banc*) 48

Pratt v. Maine, 408 F.2d 311
(1st Cir. 1969) 28

Rogers v. Peck, 199 U.S. 425 (1905) 32

Ruiz v. Estelle, 660 F.2d 555
(5th Cir. 1981) 30

Ruiz v. Estelle, 666 F.2d 854
(5th Cir. 1982) 30

Shaw v. Martin, 613 F.2d 487
(4th Cir. 1980) 37

Simpson v. Teets, 248 F.2d 465
(9th Cir. 1957) 28

Stewart v. Beto, 454 F.2d 268
(5th Cir. 1971), cert. denied,
406 U.S. 925 (1972) 29

Tate v. United States, 359 F.2d 245 (1966) 28

United States v. Restro, 529 F.Supp. 579 (W.D. Pa. 1982) 37

United States ex rel. Stewart v. Ragen, 231 F.2d 540 (7th Cir. 1956) 28

Younger v. Harris, 401 U.S 37 (1971) 32

CONSTITUTIONS, STATUTES, AND RULES

Constitutions

U.S. Const. amend. VI 2

U.S. Const. amend. VIII 2

U.S. Const. amend. XIV 2

Statutes

28 U.S.C. §1915(a) 2

28 U.S.C. §2101(e) 1

28 U.S.C. §2251 2,23,30,31,32

28 U.S.C. §2253 1,2,4

28 U.S.C. §2254 22

14 Stat. 386 (codified at Rev. Stat. §766, 2d. ed. 1878) 32

Tex. Code Crim. Proc. Ann. art. 11.07 3

Tex. Code Crim. Proc. Ann. art. 37.07 2,40

Tex. Code Crim. Proc. Ann. art. 37.071 2,40,41

Tex. Code Crim. Proc. Ann. art. 37.071(f) 2

Tex. Code Crim. Proc. Ann. art. 43.14 4

Tex. Penal Code Ann. §19.03(a)(1) 2,41

Rules

S.Ct.R. 18 x

Rule 4(a), Federal Rules of Appellate Procedure 1

Rule 8, Federal Rules of Appellate Procedure 1

Rule 22(b), Federal Rules of Appellate Procedure . 2,23,29,30,32,35

Rule 52, Federal Rules of Appellate Procedure 44

R. 701, Federal Rules of Evidence 49

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Stone, "Comment," 132 Am.J.Psych. 829 (1975) 47

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W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W. J. Estelle, Jr., Director, Respondent herein, by and through his attorney, the Attorney General of Texas, and submits this his brief:

OPINIONS BELOW

The unpublished opinion of the district court in *Barefoot v. Estelle*, No. W-81-CA-191 (W.D. Tex. 1982) is reproduced in the joint appendix, hereinafter, "JA," at 5. The opinion of the United States Court of Appeals for the Fifth Circuit is published as *Barefoot v. Estelle*, 697 F.2d 593 (5th Cir. 1983), and is also reproduced at JA 16.

JURISDICTION

The district court entered its memorandum opinion and judgment adverse to Petitioner on November 9, 1982 (JA 14, 15). Petitioner filed notice of appeal on November 24, 1982, and obtained a certificate of probable cause to appeal on December 13, 1982. Thus, jurisdiction was properly conferred upon the United States Court of Appeals for the Fifth Circuit by virtue of Rule 4(a), Federal Rules of Appellate Procedure; Rule 22(b), Federal Rules of Appellate Procedure; and 28 U.S.C. §2253.

Petitioner filed his petition for writ of certiorari in this Court on January 24, 1983. The same day, the Court exercised its jurisdiction under 28 U.S.C. §2101(e), and S.Ct.R. 18, to review a case pending in a federal court of appeals before judgment "upon a showing that the case

is of such imperative public importance as to justify the deviation from normal appellate practice and require immediate settlement in this Court."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner asserts that this case involves U.S. Const. amends. VI, VIII, and XIV. He further relies upon and sets forth in an appendix to his brief 28 U.S.C. §§1915(a), 2251 & 2253, as well as Rules 8, 22(b), Federal Rules of Appellate Procedure. Also involved is Tex. Code Crim. Proc. Ann. art. 37.071, reproduced in Petitioner's appendix to his brief.

STATEMENT OF THE CASE

A. Procedural History

On August 9, 1978, Petitioner was indicted by the grand jury of Bell County, Texas, for capital murder under Tex. Penal Code Ann. §19.03(a)(1), murder of a peace officer acting in the lawful discharge of his official duty. The crime was alleged to have been committed on August 7, 1978. *State v. Barefoot*, Cause No. 26,812. Jury selection began on October 31, 1978. The guilt or innocence phase of Petitioner's trial, bifurcated like all criminal trials in Texas under Tex. Code Crim. Proc. Ann. art. 37.07, began on November 14, 1978. On November 17, 1978, the jury returned a unanimous verdict of guilt. The docket sheets reflect that final arguments of counsel were concluded at 12:45 p.m. and that the jury returned its verdict of guilt at 2:15 p.m.

On November 20, 1978, the punishment phase of trial began. Evidence concluded and the jury retired to deliberate at 10:12 a.m. on November 21, 1978. The jury returned its unanimous death verdict at 11:12 a.m. the same day. Under Tex. Code Crim. Proc. Ann. art. 37.071(f), an automatic appeal was taken to the Texas Court of Criminal Appeals. The en banc Court of Criminal Appeals affirmed the judgment seven-two on March 12, 1980. *Barefoot v.State*, 596 S.W.2d 875 (Tex.Crim.App. 1980). Two dissenting judges would have reversed the conviction for the erroneous admission of extraneous offenses. *Barefoot v. State*, 596 S.W.2d at 889 (dissenting opinion of Clinton, J.). Thereafter, Petitioner was sentenced to die by injection before sunrise on September 17, 1980.

This Court entered a stay of execution pending the filing of a petition for writ of certiorari on July 29, 1980. *Barefoot v. Texas*, _____U.S._____ (1980). The petition was filed under Cause No. 80-5320 on August 27, 1980, and on June 29, 1981, the Court denied the petition and dissolved the stay of execution. On August 14, 1981, Petitioner was again sentenced to death by the trial court, which set his execution sometime before sunrise on October 13, 1981.

Petitioner next filed an application for writ of habeas corpus in state court pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 on September 29, 1981. This application was denied by the Texas Court of criminal Appeals on October 7, 1981.

On October 9, 1981, Petitioner filed his first federal habeas corpus application in the United States District Court for the Western District of Texas, Austin Division. *Barefoot v. Estelle*, No. A-81-CA-422. On October 9, 1981, Petitioner's execution was stayed pending consideration of his application for writ of habeas corpus. Subsequently his application was transferred to the Waco Division of the Western District as *Barefoot v. Estelle*, No. W-81-CA-191. The district court initially set evidentiary hearings for April 26, 1982, and June 10, 1982, both of which were postponed. Respondent, aware of Petitioner's dilatory preparation for these hearings and that motions for continuance were avoided only because of the district court's propitious sua sponte continuances, on June 17, 1982, was moved to renew the motion to expedite consideration that he had originally filed on January 22, 1982. Respondent also asked for an immediate evidentiary hearing and appointment of local counsel.

On June 17, 1982, the district court set an evidentiary hearing for July 28, 1982. On June 24 and 25, 1982, the district court entered a series of four orders ruling upon Respondent's motions. The district court granted Respondent's motion for an evidentiary hearing. He granted Respondent's motion to require the filing of a pre-trial order by July 12, 1982. The court also granted Respondent's renewed motion to expedite consideration:

Petitioner is ORDERED to be ready for the

> hearing on July 28, 1982. If he is not, present counsel shall be dismissed and new counsel appointed at that time.

Finally, the district court ordered the parties to issue all necessary subpoenas by July 12, 1982.

The evidentiary hearing transpired as scheduled on July 28, 1982. On November 12, 1982, the district court entered its findings of fact and conclusions of law (JA 5) and judgment (JA 15) adverse to Petitioner. Respondent moved to vacate the previously entered stay of execution and the court granted that motion on December 8, 1982. Petitioner filed notice of appeal and an application for a certificate of probable cause on November 24, 1982. On December 13, 1982, the district court found probable cause for an appeal under 28 U.S.C. §2253 and Rule 22(b), Federal Rules of Appellate Procedure.

On December 20, 1982, the state convicting court sentenced Petitioner to die sometime before sunrise on January 25, 1983, pursuant to Tex. Code Crim. Proc. Ann. art. 43.14. The same day, Petitioner filed an original application for writ of habeas corpus in the Texas Court of Criminal Appeals. It was denied the next day. On January 11, 1983, Petitioner filed a motion for stay of execution in the Texas Court of Criminal Appeals. It was denied the same day.

Three days later, on January 14, 1983, Petitioner filed an application for stay of execution pending appeal in the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit scheduled oral argument for January 19, 1983, allowing Petitioner's attorney "unlimited time to discuss any matter germane to the decision before us." (JA 17). After having studied the briefs and the record, the court on January 20, 1983, entered an opinion holding that there was no patent substantial merit, or semblance thereof, to any of Petitioner's constitutional objections, and denied the motion for stay of execution. *Barefoot v. Estelle*, 697 F.2d 593 (5th Cir. 1983); JA 16.

On January 24, 1983, Petitioner filed his petition for certiorari in this Court. Following the submission of Respondent's response, Petitioner's supplemental motion for stay of execution, and Respondent's supplemen-

tal response, the Court on January 24, 1983, entered an order treating the application as a petition for writ of certiorari before judgment, and granted certiorari. *Barefoot v. Estelle*, _____U.S._____, 103 S.Ct. 841 (1983).

Meanwhile, Petitioner had filed in the district court, under Cause No. W-81-CA-191, what he styled a motion for stay of execution. The sole substantive ground of this motion is that a witness presented by the prosecution at trial, Mary Richards, had perjured her testimony with knowledge and at the insistence of the prosecution. The district court scheduled an evidentiary hearing for the afternoon of January 24, 1983, in El Paso, Texas. After learning that this Court had stayed Petitioner's execution, the district court postponed the evidentiary hearing in that cause until February 10, 1983. Among the numerous witnesses who testified was Mary Richards. A decision adverse to Petitioner in that cause, which was renumbered as W-83-CA-53, was rendered on March 28, 1983. Petitioner's motion in this Court to stay further proceedings in the district court is pending.

Petitioner has also sought to stay further proceedings in the Fifth Circuit, which has established a moderately expedited briefing schedule for other issues that Petitioner might wish to raise in his appeal from the adverse adjudication in No. W-81-CA-191. The Fifth Circuit on March 3, 1983, denied Petitioner's motion to stay further appellate proceedings in that forum. Petitioner's motion to stay such proceedings is also presently pending before the Court.

B. The Evidence at Petitioner's State Court Trial

1. The Guilt or Innocence Phase of Trial.

On August 7, 1978, Donnie Ray Tiller and Robert Roberson lived in a trailer in Killeen, Texas. Residing with them were Radene Layto, Deborah Forbes and Petitioner, who began living at the trailer in June under the assumed name of Darren Collier (SF 1399-1408). During the summer of 1978, Petitioner asked Tiller many times to get him a gun (SF 1412) and often talked to both Tiller and Roberson about wanting to commit robberies in Harker Heights, Texas, a city contiguous to Killeen (SF 1414, 1512). Petitioner also told Tiller that he had been roughed up during an arrest for public in-

toxication in Harker Heights and that Tiller would be reading about him in the newspaper for killing a Harker Heights police officer (SF 1413-14).

At approximately 2:00 p.m. on August 6, 1978, Petitioner told Tiller that he planned to rob the Oasis Club in Harker Heights on the morning of August 7, 1978, and to create a diversion for the police by setting fire to or blowing up a building in Harker Heights (SF 1415-18). Petitioner left the trailer at 4:00 p.m. August 6, 1978 (SF 1419-20) and at 4:00 a.m. on August 7, 1978, Tiller went to work at the Yellow Cab Company in Killeen, as a dispatcher (SF 1423).

Robert Roberson was also employed by the Yellow Cab Company (as a driver) and began work at 5:00 p.m. on August 6 and finished at 4:15 a.m. on August 7 (SF 1514-15). He returned to the trailer at 4:30 a.m. and went to bed with Deborah Forbes (SF 1516). Petitioner then arrived at the trailer, aroused Roberson out of bed and asked him for a ride to Harker Heights. Petitioner was wearing a white T-shirt, Levi blue jeans, and a pair of pointed toe boots. In his possession were a homemade bomb, a plastic milk jug, and a fully loaded .25 automatic pistol, which he carried in his back pocket (SF 1517-21). Roberson agreed to drive Petitioner to Harker Heights and on the way Petitioner told him that he was going to blow up the Silver Spur located on Highway 190 in Harker Heights (SF 1522). Roberson drove Petitioner to Mickey's Number Four, a drive-in grocery in Harker Heights near the Silver Spur, so that Petitioner could buy some gasoline. Refusing to carry Petitioner to the Silver Spur, Roberson left him armed with a .25 caliber pistol and a gallon of gasoline at the drive-in store and returned to the trailer with the homemade bomb which Petitioner inadvertently had left in the car (SF 1524-28).

At 5:15 a.m. John Edwards, a soldier at Fort Hood, Texas, who resided in Harker Heights, left for Fort Hood driving his usual route, which took him past the Silver Spur (SF 1158-68). As Edwards drove towards Business Highway 190 and approached the Silver Spur, he observed flames coming from the roof of the club and Petitioner facing the fire standing on the edge of the

parking lot next to Highway 190 (SF 1168-74). No one else was present in the area (SF 1171-72). As Edwards started to turn onto Business Highway 190, Petitioner turned and ran across the highway (SF 1174-77). Edwards drove to the police station, informed the police about the fire, and then returned to the scene of the fire (SF 1179-83). As he was driving down Business Highway 190 towards the fire, he observed Petitioner running down the highway towards the intersection of Amy Lane (SF 1194-97). At the scene of the fire, Edwards observed a fire inspector remove a melted plastic jug from the roof of the burning building (SF 1189-90). Edwards then informed the eventual murder victim, Officer Carl Levin, of what he knew about the fire, including observing Petitioner at the scene of the fire and later again near Amy lane. The uniformed officer then left in his marked patrol car down Highway 190 towards Amy Lane (SF 1194-97).

Michael Thrash, a soldier at Fort Hood, lived on Amy Lane. At 5:35 a.m. on August 7, 1978, he left for Fort Hood on foot walking down Amy Lane. While walking, he observed a patrol car with emergency flashers on, parked on Amy Lane at the intersection of Valley Road (SF 1219-27). The spotlight of the patrol car was on some bushes and Thrash observed a man wearing blue jeans and a white T-shirt (SF 1245) walk out of the bushes into the spotlight and approach the uniformed police officer, who was standing next to the patrol car (SF 1228-31). As the two were talking within two feet of each other, the man who appeared out of the bushes shot the police officer in the head without provocation at point blank range (SF 1237-43). The officer fell to the ground and the assailant fled, running down Valley Road. Thrash ran to the patrol car to help the officer, summoned assistance over the police radio, and pursued the assailant a short distance before losing him (SF 1243-46).

Carl Levin, the police officer, died beside his patrol car (SF 1253) with his gun still strapped in his holster (SF

1331). A single shell casing was found between his body and his patrol car (SF 1252). The autopsy revealed that Levin died from a bullet fired at close range that entered the left side of his forehead two inches above his left eyebrow and passed through his brain (SF 1743-53). The projectile was recovered (SF 1752) and ballistic tests established that it was fired into the head of Carl Levin from a distance of 3-6 inches (SF 1780).

Mary Richards lived on Valley Road near the intersection of Amy Lane and while in bed before 5:45 a.m., she heard two shots. According to her testimony, Richards looked out of her bedroom window facing the street and observed a man resembling Petitioner wearing a white T-shirt (SF 1277) running down Valley Road away from Amy Lane (SF 1258-69). While Richards stated that she could not positively identify the fleeing man, she described him as about five feet five inches to five feet seven inches tall, having a muscular build and wavy, coarse hair, and pointed out Petitioner as resembling him (SF 1265-69).

At approximately 10:45 a.m. the same morning, after hearing the news on the radio, Donnie Ray Tiller received a phone call at the office of the Yellow Cab Company from Petitioner (SF 1426-28). Regarding the shooting of the police officer in Harker Heights earlier that morning, (SF 1432), Petitioner told Tiller "I shot him. I killed the mother fucker. I shot him in the head." (SF 1429). Petitioner asked what he should do and stated that he was calling from the Gibson's Store on Highway 190 and that he would call back. After this conversation, Tiller related to Detective Carl Trippet of the Killeen Police Department the substance of the phone call (SF 1430).

Later the same morning, three police officers went to the trailer belonging to Tiller and Roberson looking for Petitioner and awoke Roberson. Petitioner was not there and after the officers left, Roberson went back to bed, only to be awakened again — this time by Petitioner (SF 1529-32). Petitioner was dressed like he was when

Roberson last saw him, wearing a white T-shirt, blue jeans and boots, but his face, mustache and white T-shirt were speckled with blood (SF 1523-33). Petitioner was in a state of panic (SF 1534). Roberson told him that the police were looking for him. Petitioner then told Roberson that he had to get out of town because "he wasted a cop, that he killed a cop." (SF 1533). Roberson asked him how he killed the police officer and Petitioner demonstrated how he committed the crime by putting his hand in his back pocket, pulling his hand out and putting his finger against Roberson's head at the place that corresponded to the bullet wound on the head of the slain officer (SF 1534-35). Petitioner then washed up, changed clothes wearing blue jeans, a brown knit-shirt, and a jean vest and left the trailer (SF 1534-38).

Later that morning, Petitioner met Francisco Hernandez on a street in downtown Killeen. Petitioner told Hernandez that he had lost his job and got kicked out of the Star Motel where he was staying with a friend (SF 1599-1602). Hernandez invited Petitioner to his home where Petitioner ate lunch, slept in the afternoon and stayed the night (SF 1604-10). The next morning, August 8, 1978, Hernandez listened to a news broadcast on the radio describing Petitioner and then inquired, "That's you they're looking for." Petitioner replied, "I am the one that they're looking for, but I didn't kill no policeman." Hernandez asked Petitioner to turn himself in, but he refused (SF 1612-14). Hernandez then asked Petitioner to leave and Petitioner shaved off his mustache and changed into another shirt that Hernandez gave him (SF 1615-16). They then left Killeen and went to the bus station in Belton, Texas, where Petitioner decided to take the next bus to Houston. Hernandez left Petitioner in Belton and hitchhiked to Austin, where he went to the police station and informed the police that the bus carrying Petitioner would arrive in Houston at 11:30 p.m. (SF 1617, 28).

Two Texas Rangers and three Houston Police Officers arrested Petitioner in the Houston Greyhound Bus Sta-

tion shortly after 11:20 p.m. on August 8, 1978 (SF 1662-72). A fully loaded .25 caliber automatic pistol was found in his right rear pocket (SF 1675-80). Ballistic tests conclusively revealed that the projectile that killed Officer Carl Levin and the shell casing found beside the body of the slain officer were fired from the pistol found in Petitioner's pocket (SF 1781-82).

To show Petitioner's motive for killing Officer Levin, the prosecution presented evidence that Petitioner had been arrested and indicted in New Mexico for the offenses of sexual penetration of a minor and kidnapping and that while waiting for trial on those charges, he escaped from jail.[1] Mike Roach testified that he was a peace officer in Grants, New Mexico, and that on October 29, 1977, he arrested Petitioner in New Mexico for the offense of sexual penetration of a minor and took him before a magistrate (SF 1113-17).

Judge John Horececk testified that he is a magistrate of Valencia County, New Mexico, and that on November 1, 1977, he arraigned Petitioner for the offense of sexual penetration of a minor and kidnapping; that he informed him that the maximum penalty for the sexual penetration was life imprisonment; that the punishment for kidnapping was from five to fifteen years imprisonment; and that he committed Petitioner to the Valencia County jail in lieu of $100,000.00 bond (SF 1118-22).

There was further testimony that Petitioner and another prisoner on January 19, 1978, escaped from the Valencia County Jail by knocking a hole in their cell wall, entering an adjoining cell, and fleeing out a window that they removed (SF 1122-25; 1138-42). Ronald Childress testified that he represented Petitioner upon the indictment in Cause No. 4374-C pending against him

1. The prosecution gave Petitioner notice on October 16, 1978, that the State intended to prove that he was charged by indictment with the offense of rape and kidnapping of a child and that while waiting trial in New Mexico on those charges, he had escaped from jail (Tr. 193).

for sexual penetration of a minor and kidnapping and that the case was set for trial for the week of January 30, 1978 (SF 1125-31).

The prosecution introduced into evidence a copy of the indictment in Cause No. 4374-C, styled *The State of New Mexico v. Thomas Andy Barefoot*, charging Petitioner with rape, sexual abuse and kidnapping of a child (SF 2233); a copy of the arraignment in Cause No. 4374-C (SF 2235); a copy of the indictment in Cause No. CR78-40, styled *The State of New Mexico v. Thomas Barefoot*, charging Petitioner with escape (SF 2236); and a copy of the warrant for Petitioner's arrest for escape that issued in Cause No. CR78-40 (SF 2237).

2. The Punishment Phase of Trial

The prosecution proved that Petitioner had been previously convicted of the following offenses:

(1) Possession of an unregistered firearm on October 24, 1975, in Cause No. 75-164 in the United States District Court for the Western District of Oklahoma for which Petitioner was sentenced to one year in prison (SF 1964-66, 2349);

(2) Possession of amphetamines on December 2, 1974, in Cause No. 36858 in the 15th Judicial District Court of LaFayette Parish, Louisiana for which he was sentenced to 5 years, the imposition of which was suspended for 5 years on the condition that he serve one year in jail and 5 years on probation (SF 1968-71, 2394);

(3) Distribution of marihuana on December 2, 1974, in Cause No. 37573 in the 15th Judicial District Court of LaFayette Parish, Louisiana, for which he was sentenced to serve 5 years, the imposition of which was suspended for 5 years on the condition he serve one year in jail and 5 years on probation (SF 1968-71, 2395);

(4) Possession of marihuana in Cause No. 36859 on November 26, 1974, in the 15th Judicial District Court of LaFayette Parish, Louisiana, for which he was sentenced to serve 6 months in jail (SF 1971-72, 2526); and

(5) Carrying a concealed weapon in Cause No. 37572 in the 15th District Court of LaFayette Parish, Louisiana, on November 26, 1974, for which he was sentenced to serve 6 months in jail (SF 1973-74, 2525).

The prosecution also offered evidence of Petitioner's reputation for peaceful and law abiding citizenship. The State proved through numerous witnesses that Petitioner had a bad reputation for being a peaceful and law abiding citizen in 1969 when he resided in Morgan City, Louisiana (SF 1975-78); in 1972 in New Iberia, Louisiana (SF 1978-79); in 1973 in LaFayette, Louisiana (SF 1980-82); in 1973 and 1974 in New Iberia and LaFayette, Louisiana (SF 1983-87); in 1975 in Oklahoma City, Oklahoma (SF 1988-90); in 1976 in Odessa, Texas (SF 1991-94); in 1977 in Woodward, Oklahoma (SF 1995-2000); in 1977 in Neodesha, Kansas (SF 2001-03); and in 1977 in Valencia County, New Mexico (SF 2004-09).

The prosecution also presented psychiatric testimony at the punishment phase. Dr. John T. Holbrook stated that he had previously testified for both the prosecution and the defense in death penalty cases (SF 2072, 2103). He had never interviewed Petitioner (SF 2073, 2101). The prosecutor then formulated a lengthy hypothetical question to Holbrook (SF 2074-88). In the first part of the hypothetical question, Holbrook was asked to assume that a man from 1969-1978, when he was between twenty-four and thirty-three years of age, had gained a bad reputation for being a peaceful and law abiding citizen in numerous communities in five states. He asked Holbrook to assume that the man had been convicted of the same crimes of which Petitioner has been convicted (SF 2074-77). The prosecutor then recounted essential details of the murder of which Petitioner had just been convicted, including the circumstances that Petitioner had planned to commit drug related crimes (SF 2078); that he had used an alias (SF

2079); that he had stated that he was going to kill a Harker Heights police officer (SF 2080); that he had committed drug related crimes; that he was unemployed; that he had boasted of other crimes he had committed (SF 2081); that he had stated he planned to commit a robbery and murder someone; that he had obtained a gun and a bomb for that purpose; that he had murdered a police officer in the manner that Petitioner had murdered Officer Carl Levin (SF 2082-86); that he had admitted the crime to others and had expressed no remorse for his victim (SF 2088); and that he had then attempted to flee the community.

Holbrook testified that the facts of the hypothetical question established that the subject was "unable to establish any sort of normal kind of relationship to society" (SF 2092) and that he was not "capable of relating to any of the normal institutions that most people live by ..." (SF 2093). He further testified that the subject had demonstrated an "ascending sort of scale of criminal behavior ..." and that it did not sound as though incarceration would be rehabilitative. He noted that the subject had used aliases (SF 2094); was an "extremely self-serving person" (SF 2094); was manipulative of others; was intent on committing serious crimes; and that he had boasted of crimes he had committed (SF 2095).

Holbrook testified that these are the characteristics of a criminal sociopath (SF 2097), which he described as:

1. Exhibiting criminal anti-social behavior (SF 2098);
2. "Extremely self-centered and self-serving";
3. "Unable to form loyalties to the normal institutions such as family, friends, politics, law, religion," or others;
4. Lying and manipulatively using others;
5. Exhibiting a pattern of violence (SF 2099); and
6. Escaping or running away from legal and other problems.

Holbrook testified that there is no effective treatment for such persons (SF 2100).

On cross-examination, the defense emphasized that Holbrook had never examined Petitioner (SF 2101) and that Holbrook had heard no evidence in the case (*id.*). Accordingly, Holbrook did not know if the facts of the hypothetical were true in Petitioner's case and he admitted that if they were not, that would affect his answer (SF 2104). He was forced to admit that the American Psychiatric Association had published a task force report stating that the prediction of future violence is unreliable (SF 2103).

Dr. James P. Grigson, a psychiatrist, stated that he had testified for the defense as well as the prosecution in other cases (SF 2110). He had never examined Petitioner (SF 2110, 2132). After hearing essentially the same hypothetical question that had been posed to Holbrook (SF 2113-26), he testified that the facts of the hypothetical question showed a "fairly classical, typical sociopathic personality disorder." (SF 2128). He testified that persons with such a disorder typically demonstrate lack of conscience; "repeatedly break the rules"; "con, manipulate and use people"; and are only interested in self-gratification. He testified that the subject of the hypothetical was a rather severe sociopath (SF 2129); that there was no effective treatment for such persons; and that the probability that the subject of the hypothetical question would commit future acts of criminal violence posing a continuing threat to society was "at one hundred percent and absolute." (SF 2131).

On cross-examination, the defense emphasized that Grigson had never examined Petitioner (SF 2132) and that he had not been present during trial. Accordingly, Grigson admitted he did not know if the facts in the hypothetical were true in Petitioner's case and that if they were not, that might affect his opinion (SF 2132-33). He also admitted that he was not familiar with the American Psychiatric Association task force report and that he was not familiar with a large number of ar-

ticles and publications about which defense counsel sought to question him. Similarly, defense counsel asked Grigson about his familiarity with a large number of professional journals publishing articles relevant to Grigson's testimony, and Grigson stated that he did not read any of them (SF 2135-36).

Two prosecutors and both defense counsel made closing argument to the jury at the punishment phase of trial. Assistant District Attorney James Leitner made no mention whatsoever of the psychiatric testimony during his argument (SF 2145-56).

Defense counsel Gerald Brown vigorously attacked Holbrook's and Grigson's testimony (SF 2156-66). He argued that based upon the evidence, the jury should know that psychiatrists cannot predict human behavior with any degree of certainty. In light of the professional literature and studies, as well as the American Psychiatric Association task force report (SF 2157), the psychiatric profession particularly cannot predict future dangerousness with any degree of reliability. He emphasized that the state's expert witnesses had never examined Petitioner (2158), and that the hypothetical facts did not support their diagnosis. He also argued that even if Petitioner were a sociopath, it did not necessarily follow that he would commit future acts of violence against society (SF 2160). He argued at some length that the factual basis of the hypothetical questions was false (SF 2160-65), arguing particularly that based upon the evidence, it had not been shown that Petitioner was especially egocentric or manipulative; that he had avoided employment; that he was a schemer or a planner; that he was the prime planner of the escape from New Mexico; or that he was a trouble maker in jail.

During his closing argument, defense counsel Steven Blythe (SF 2166-71) mentioned the psychiatric testimony briefly in a portion of his argument. He, too,

emphasized that the prosecution's psychiatrists had never examined Petitioner and that they had not talked to numerous other persons whose knowledge of Petitioner might have fundamentally altered the psychiatric testimony, such as Petitioner's family, prison or jail officials, school officials, neighbors, or friends. He argued that psychiatrists who would testify under such circumstances were unethical.

Finally, District Attorney Cappy Eads (SF 2172-83) presented his summation. He emphasized that the jury must decide the credibility of the expert witnesses (SF 2175). He admitted, "I do not have a crystal ball to come into this courtroom. I cannot tell you exactly what's going to happen..." (SF 2176). After emphasizing the professional credentials of Holbrook and Grigson, he told the jury:

> "Now, again, you can weigh their testimony and you can say well, I want to put a certain amount of credence here or a certain amount here. But that's what the doctors told you and if in anyway the hypothetical question which I read to Dr. Grigson was in anyway inaccurate or contained anything which you as a jury felt to be untrue, then certainly you disregard that question."

(SF 2178). He then argued the import of the evidence presented at the guilt or innocence and punishment phases of trial.

The docket sheets reflect the jury deliberated no more than one hour before returning a verdict of death. The trial court had instructed the jury, among other things, as follows:

> "The burden of proof is on the State. You are the exclusive judges of the facts proved, of the

credibility of the witnesses, and of the weight to be given to the testimony...

You are further instructed that in determining each of these special issues you may take into consideration all of the evidence submitted to you in the full trial of the case...

There has been introduced the testimony of certain witnesses who purport to be skilled in their line of endeavor. Such witnesses are known in law as expert witnesses. An expert witness is one who is skilled in any certain science, art, business, or profession and possessed a peculiar knowledge acquired by study, observation and practice. You, the jury, are instructed that you may consider the testimony of these witnesses and give it such weight and value as you think it should have, but the weight and value to be given their testimony is for you to determine.

The testimony of any expert, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive."

JA 4.

C. The Evidence at the Federal Evidentiary Hearing

At the evidentiary hearing on July 28, 1982, four expert witnesses, two psychiatrists and two psychologists, testified. The first, Dr. Fred L. Fason, testified for Petitioner. (R. 7). His testimony was permeated by his philosophical opposition to the kind of testimony given by Holbrook and Grigson at Petitioner's trial, and by his distaste for forensic psychiatrists generally. For example, he criticized Dr.

Holbrook, who had "a very fatalistic philosophy of looking at individuals ... without hope." (*Id.*) Although agreeing that predictions of future dangerousness are most reliable for those who have committed repeated acts of violence in the past, Fason nevertheless said:

> "That is why I don't think psychiatrists should be involved in this situation. I think it ought to be up to the jury."

(R. 90). Although Fason said that he believed in capital punishment, he expressed a doubt that he could ethically testify at the punishment phase of a capital trial in Texas because he believed in imposing the death penalty "for what somebody has done, not for what somebody says they are." (R. 47).

Although Fason had interviewed only a small number of suspected criminals, and admitted that he was familiar with none of the major research regarding the prediction of future violent behavior (R. 75-76), he denied that any psychiatrist might be more expert than he in the field of sociopathic psychiatry. (R. 61, 64). In fact, he proclaimed, "I am more expertise [sic] in the field of forensic psychiatry than most of the individuals who specialize in it." (R. 65). When questioned why he denied a reasonable possibility of special expertise in this area of psychiatry, whereas he admitted it in others such as pediatric psychiatry, he agreed with the statement that psychiatrists who deal with criminals "as a group don't measure up to psychiatrists such as yourself." (R. 68).

Nevertheless, Fason agreed with Dr. Holbrook's six or seven criteria for the diagnosis for sociopathy (R. 32, 86). He admitted that evidence of a bad reputation for being a peaceful and law abiding citizen in numerous communities "might" have psychiatric meaning in conjunction with the other facts of the hypothetical ques-

tion (R. 23), and he stated that involvement in the drug community "would increase my suspicion, in reviewing the history, that he is sociopathic." (R. 24). He stated that the hypothetical question contained enough facts to make an impression, but not a diagnosis. (R. 35-40). He admitted, in fact, that based upon the facts contained in the hypothetical question, "My most probable diagnosis, my impression would be sociopathic personality disorder, antisocial type, severe." (R. 39; see, R. 42-43). He stated that he could form such an "impression" to a ninety percent certainty. (R. 22, 56). He agreed that his impression was "identical to [Grigson's and Holbrook's] diagnosis." (R. 56).

Fason admitted that regarding Grigson's testimony about the ineffectiveness of treatment or the possibility of change for sociopaths, "There is some truth in that, and by and large we do not have effective means of treating the sociopathic personalities." (R. 48, 90). He added, however, the treatment of sociopaths "is expensive, it carries with it a low order of success, and it takes someone who is extremely skilled in the treatment of the sociopath." (R. 28). As an example of someone who had been cured of sociopathy, he cited the son of a wealthy neighbor who was cured after treatment lasting three years at a cost of $300,000.00 (R. 29).

Dr. Wendell Lee Dickerson, a psychologist, testified for Petitioner that he, too, could not ethically testify upon the basis of hypothetical questions at the punishment phase of a capital trial. (R. 108). Based upon the facts of the hypothetical question, Dickerson was asked whether he agreed with Fason's impression that Petitioner was a sociopathic personality, antisocial type, severe. Dickerson replied, "I think he gave a reasonably accurate assessment of that." (R. 116). After declining "to make any diagnostic impression of Mr. Barefoot," (*id.*), Dickerson was asked:

"Q [by Assistant Attorney General Becker]: I'm not asking you to diagnose him in the courtroom. I am asking you to take the hypothetical question as if you would a question on the medical board examination, and whether that is the diagnosis you would make.

A: [by Dickerson]: That would be my first, my first stop, you bet.

Q: And you would think that you were correct?

A: I would think there was a doggone good chance I was.

Q: Dr. Fason said he would be around ninety percent sure. How about you?

A: I probably wouldn't go quite that high, but the sentiment expressed there I would agree with."

(R. 116-17).

Dr. George Parker, a psychologist, testified for Respondent. After enumerating the criteria for a diagnosis of sociopathy (R. 186 *et seq.*), Parker testified that there was sufficient information in the hypothetical question to form an opinion whether the subject were a sociopath (R. 188) and whether he would continue to commit future acts of violence posing a danger to socie-

Dickerson also admitted that the results of Petitioner's Minnesota Multiphasic Personality Inventory, available before Petitioner's trial and at the evidentiary hearing but not seen or relied upon by Drs. Holbrook or Grigson, supported the same diagnosis. (R. 127).

ty. (R. 189-90). He stated the probability at "somewhere around ninety percent," (R. 190), and later stated that he could make such an assessment with "high confidence." (R. 194). He stated that Drs. Holbrook and Grigson and their methods are "are in the realm of accepted psychological practice." (R. 204). Although acknowledging that some psychiatrists, based upon some studies, do not believe that future dangerousness can be reliably predicted, Parker agreed with the position of the American Psychiatric Association as stated in its amicus curiae brief in *Estelle v. Smith*, 451 U.S. 454 (1981):

> "A clinician might be fairly confident that violent behavior would recur, as for example where a parent's past behavior clearly and repetitively evidences physical abuse of his or her children, but as the task force noted the relatively high degree of reliability in these cases is a function of knowing that the base rate of such behavior, that is the rate of repetitive past violent acts, is very high with a person under scrutiny. It would not be necessary that the patient be mentally ill or suffering from a psychiatric disorder in order to predict that such behavior will recur."

(R. 202-03). He agreed that a number of studies have characterized predictions of future dangerousness as futile "because those studies have selected people who do not have a steady persistent history of committing acts of violence." (R. 201). He enumerated a number of these studies (R. 196-199), adding that John Monahan is the "leading thinker on this issue." (R. 195). Thus, Parker testified, predicting future dangerousness among mental patients generally is highly unreliable; convicted felons provide a better pool; and felons who have repeatedly committed violent crimes in the past are the group about which predictions of future dangerousness are most reliable. (R. 196-203).

Finally, Parker testified that he believes it a proper professional role for a psychologist to inform the jury in a capital case of the conclusions he has reached based upon his training and experience. (R. 215).

Dr. Richards Koons, a psychiatrist, testified that there are psychiatric specialists in sociopathy who are more expert that other psychiatrists in making that diagnosis and predicting future dangerousness. (R. 228-29). He discussed the criteria for such a diagnosis and prediction (R. 238-41), and said he believed that the hypothetical question contains adequate information to make just such a diagnosis. (R. 231). He assessed the probability of future dangerousness on the facts of the hypothetical question as "quite high" (R. 231), although, "Now, I wouldn't state it as one hundred percent and absolute." (R. 232). He agreed that predictions of future violence become more reliable when there is a repetitive, persistent history of past acts of violence, as the American Psychiatric Association stated in its amicus curiae brief in *Estelle v. Smith*. (R. 247). Finally, Koons testified that there is little hope of successful treatment of such persons because medical science cannot "instill conscience where none exists as an adult." (R. 234).

SUMMARY OF ARGUMENT

The Stay Issue

Petitioner's argument that a death sentenced habeas corpus petitioner who obtains a certificate of probable cause to appeal under 28 U.S.C. §2253 and Rule 22, Federal Rules of Appellate Procedure, is automatically entitled to a stay of execution pending his appeal, should be rejected. First, such a position is at odds with the statutory scheme enacted by Congress governing appeals in federal habeas corpus cases filed under 28 U.S.C. §2254. Although the prior statutory scheme ex-

plicitly granted such automatic stays, the revisions of these statutes evinces a legislative intent that in some cases, a stay of execution should be denied notwithstanding the granting of a certificate of probable cause to appeal.

Whether the request for a stay pending appeal is considered in the context of Rule 8, Federal Rules of Appellate Procedure, or 28 U.S.C. §2251, providing for the stay of state court proceedings in certain circumstances, staying a state execution in a death penalty case is a serious incursion upon the state judicial process invoking important comity concerns. Such an incursion is unjustified unless the petitioner can present at least one issue with a semblance of patent substantial merit creating at least a reasonable judicial doubt as to his likelihood of success on appeal. Otherwise, the granting of a stay is a useless judicial act, creating further unnecessary and unwarranted delay in the execution of the sentence in the face of an appeal whose result is foreordained.

This result is consonant with this Court's major prior pronouncements upon the matter, including *Garrison v. Patterson*, 391 U.S. 464 (1968); *Carafas v. LaVallee*, 391 U.S. 324 (1968); and *Nowakowaski v. Maroney*, 386 U.S. 542 (1967). These authorities stand for the proposition that once a habeas petitioner has obtained a certificate of probable cause to appeal, his appeal must be disposed of in accordance with the ordinary procedures of the relevant court of appeals, and the habeas petitioner must have notice of such procedures. The petitioner must have the same opportunity for briefing and oral argument accorded other litigants.

All these requirements were fully met in this case. In requesting a stay pending appeal, Petitioner ran the same risk as other appellate litigants that by virtue of his failure to convince the Court of Appeals that his case

contained a substantial issue, denial of the stay might render his appeal moot. Two recent prior authorities of the Fifth Circuit, *O'Bryan v. Estelle*, 691 F.2d 706 (5th Cir. 1982), and *Brooks v. Estelle*, 697 F.2d 586 (5th Cir. 1982), placed Petitioner fully on notice of the procedures that would be followed. Finally, Petitioner was given ample opportunity to brief and orally argue every issue that might support the granting of the stay.

The Fifth Circuit procedures followed in this case are not demonstrably different from those followed in other courts of appeals. The allegedly contrary authorities relied upon by Petitioner were cases involving either a substantial issue or an issue as to which the court of appeals had inadequate time to determine its substantiality. The Fifth Circuit has granted stays of execution in both circumstances.

There is no good reason to alter the procedures followed by the Fifth Circuit in this case. Petitioner properly laments the strains upon the state and federal judicial systems, as well as counsel on both sides, inherent within the last minute legal flurries characteristic of executions. As Petitioner admits, however, eventually in many cases the time for an execution will come; those identical strains will be placed upon the state and federal judicial systems at that point. Petitioner presents no solution to this problem; he simply seeks to postpone it.

Meanwhile, the states suffer irreparable injury by the passing of every day that its constitutionally obtained death sentences are not carried out. The unconscionable delays attendant to death penalty litigation in this country frustrate society's mandate; promote the public perception that the law cannot be carried out; destroy whatever deterrent effect the imposition of the death penalty might otherwise have; and unfairly penalize prisoners with unconstitutional convictions who remain on death row for interminable lengths of time.

There is every reason to believe that justice is promoted, not defeated, by imposing upon death sentenced habeas petitioners a higher burden to obtain a stay than that required for obtaining a certificate of probable cause. Often grounds for relief arise only when an execution becomes imminent. In this case, for example, a witness at Petitioner's trial, apparently moved by the impending execution, contacted Petitioner's attorneys and told them that the prosecution had coerced her to commit perjury at his trial. This ground became one of the two upon which Petitioner urged the Fifth Circuit to stay his execution. The claim has now been resolved adversely to Petitioner following an evidentiary hearing in district court. The record reflects that such speedy resolution of this vexing claim would not have occurred if Petitioner's execution had been stayed automatically when he obtained his certificate of probable cause to appeal.

The Hypothetical Question Issue

Emphasizing the special need for reliable evidence at the punishment phase of capital trials, Petitioner argues that psychiatric predictions of future dangerousness are always unreliable and that in this case, any probative value of such expert testimony was outweighed by its unfairly prejudicial impact upon the jury. The record reflects that these assertions are untrue.

Both the evidence at the evidentiary hearing in district court and the professional literature fully support the finding of the district court and the Court of Appeals that expert predictions of future dangerousness are reliable where there is a repetitively persuasive pattern of past acts of criminal violence. It was shown at Petitioner's trial that during the nine years preceding his trial, he had acquired a bad reputation for being a peaceful and lawabiding citizen in eight communities in five different states. This evidence can only be

characterized as depicting an extensive, repetitive pattern of violent criminal acts. During the same period, he was convicted of numerous crimes, some involving drugs and others involving illegal weapons. In addition to these important components of the hypothetical questions the prosecution posed to its expert psychiatric witnesses at trial, the circumstances of the crime itself supported the experts' opinion that the subject of the hypothetical question was a sociopath, antisocial type, severe, who would probably continue to commit future acts of violence posing a danger to society.

Indeed, all four experts at the evidentiary hearing in district court agreed with this opinion with a high degree of certainty, although Petitioner's experts expressed ethical and philosophical concerns about psychiatrists who give such testimony.

Such expert testimony regarding future dangerousness is highly relevant in the Texas statutory capital punishment scheme, which this Court approved in *Jurek v. Texas*, 428 U.S. 262 (1976). In Jurek and in *Estelle v. Smith*, 451 U.S. 454 (1981), the Court endorsed the use of expert testimony upon the issue of future dangerousness. Petitioner's complaint that such testimony has an unfairly prejudicial impact upon the jury is without substance. The experts in Petitioner's case were subject to the same cross-examination, impeachment, and rebuttal as experts in other cases. The explicitly stated criteria for the experts' responses to the hypothetical questions allowed for the presentation of mitigating evidence that might have changed their opinions. None was presented, presumably because it did not exist. Moreover, Petitioner was free to present evidence that the prosecution's expert testimony was not only erroneous, but outside the realm of accepted psychiatric practice, as he now argues.

In fact, Petitioner was free to present virtually every criticism he now makes of such testimony. His jury was specifically instructed to assess the credibility of all witnesses, including experts, and to give only such weight to such testimony that the jury felt appropriate. To nullify the jury verdict now could only appear as an expression of lack of faith in the American system of criminal jurisprudence, which accords to the jury the judgments Petitioner now asks this Court to make.

ARGUMENT

I. A STAY OF EXECUTION SHOULD NOT BE GRANTED PENDING THE APPEAL OF A DEATH SENTENCED STATE PRISONER IN FEDERAL HABEAS CORPUS UNLESS HE PRESENTS AN ISSUE WITH A SEMBLANCE OF PATENT SUBSTANTIAL MERIT CREATING A REASONABLE JUDICIAL DOUBT AS TO HIS LIKELIHOOD OF SUCCESS ON APPEAL.

Petitioner asserts that the granting of a certificate of probable cause to a death sentenced habeas corpus petitioner creates an entitlement to a stay of execution pending appeal. This suggestion is at odds with the intent of Congress as evidenced by the statutory scheme enacted governing the conduct of habeas corpus appeals; this Court's prior authorities; and considerations of logic and equity.

A. The Statutory Scheme Enacted by Congress Governing Habeas Corpus Appeals Contemplates that a Stay of Execution may be Denied to a Death Sentenced Habeas Corpus Petitioner who has been Granted a Certificate of Probable Cause to Appeal.

The gist of Petitioner's argument is that as a matter of law, a stay of execution should be granted to a death sentenced habeas corpus petitioner who has been granted a certificate of probable cause to appeal. Because Congress has failed to provide for such an exception to the general rules governing these matters, it does not exist.

Congress has provided that a habeas corpus petitioner denied relief may not appeal unless the district court or the court of appeals grants a certificate of probable cause. 28 U.S.C. §2253; Rule 22(b), Federal Rules of Appellate Procedure. Mr. Justice (then Judge) Blackmun in his famous article, has noted the varying formulations of the standard required to grant a certificate of probable cause. [2] These varying formulations continue to find expression in the caselaw today. [3] The Fifth Circuit

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2. Mr. Justice Blackmun's article notes that some of the cases require an absence of frivolity. E.g., *Tate v. United St tes*, 359 F.2d 245, 250 (1966); *Simpson v. Teets*, 248 F.2d 465, 466 (9th Cir. 1957); *Nolan v. Nash*, 316 F.2d 776 (8th Cir.), cert. denied, 375 U.S. 924 (1963). Others refer to a demonstrable lack of substance. E.g., *Chessman v. Dickson*, 275 F.2d 604, 606 (9th Cir. 1960) (any substance at all); *Gay v. Graham*, 269 F.2d 482, 487 (10th Cir. 1959) (no substantial question); *United States ex rel. Stewart v. Ragen*, 231 F.2d 312, 313 (7th Cir. 1956) ("some substantial question worthy of consideration"); *Ex parte Farrell*, 189 F.2d 540, 543 (1st Cir), cert. denied sub nom. *Farrell v. O'Brien*, 342 U.S. 839 (1951) ("unsubstantial or clearly without merit").

3. E.g., *Foster v. Field*, 413 F.2d 1050, 1051 (9th Cir. 1969)(whether the appeal is "without merit" or presents "a substantial question"); *Pratt v. Maine*, 408 F.2d 311, 312 (1st Cir. 1969)(whether the appeal is "without precedent, cited or otherwise"); *Jackson v. South Carolina*, 498 F.Supp. 186, 191 (D.S.C. 1979)(whether the appeal is "frivolous"); *Abduc v. Lane*, 468 F.Supp. 33, 38 (E.D. Tenn.), aff'd, 588 F.2d 1178 (6th Cir. 1978)(whether the appeal is "plainly frivolous" or "constitutes a substantial question worthy of further consideration"); *Gordon v. Secretary of State of Wisconsin*, 462 F.Supp. 307, 308 (E.D. Wisc. 1978)(whether the appeal presents a "substantial question").

has held that a certificate should be granted where there is "a substantial showing of the denial of a federal right." *Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), cert. denied, 406 U.S. 925 (1972); see, *Clements v. Wainwright*, 648 F.2d 979 (5th Cir. 1981).

It appears that Mr. Justice Blackmun's observation in 1967 remains true today:

> If there is a difference in these expressions I suspect that it is of no significance. In most of these cases relief is denied. Certainly, if a matter is frivolous, it is clearly without probable cause. Thus, the cases which speak of frivolity, such as those from our own [Eighth] Circuit, would arrive at the same conclusion on a more substantive standard.

H. Blackmun, "Allowance of In Forma Pauperis Appeals in Section 2255 and Habeas Corpus Cases," 43 F.R.D. 343, 352 (1967). The granting of a certificate of probable cause by a district court may not be vacated by a Court of Appeals. *Nowakowski v. Maroney*, 386 U.S. 542 (1967).

The Fifth Circuit has viewed stays of execution in habeas corpus cases as governed by Rule 8, Federal Rules of Appellate Procedure. The considerations governing the granting of a stay pending an appeal in this circumstance are the following:

> In general, a court, in deciding whether to issue a stay, must consider: (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

O'Bryan v. Estelle, 691 F.2d 706, 708 (1982), citing *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982); *Ruiz v. Estelle*, 660 F.2d 555, 565 (5th Cir. 1981); *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. 1981); *Drummond v. Fulton County Department of Family and Children's Services*, 532 F.2d 1001, 1002 (5th Cir. 1976). The Court in O'Bryan instructs:

> While "the movant need not always show a 'probability' of success on the merits," he must "present a substantial case on the merits when a serious legal question is involved and show that *the balance of the equities, [i.e.*, the other three factors] *weighs heavily in the favor of granting the stay*." (emphasis in original).

O'Bryan v. Estelle, 691 F.2d at 708.

The Court of Appeals was justified in proceeding under Rule 8, Federal Rules of Appellate Procedure. On October 14, 1981, the district court granted Petitioner's application for stay of execution, the same day it was filed. After the district court entered final judgment adverse to Petitioner on November 12, 1982, Respondent filed a motion to vacate the stay of execution on December 2, 1982. This motion was granted on December 8, 1982. If the Fifth Circuit had stayed this order pending an appeal, the result would have been to stay Petitioner's execution.

Petitioner and several *amici curiae* argue that consideration of a stay should be governed by 28 U.S.C. §2251:

> A justice of judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any

> State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.
>
> After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceedings shall be as valid as if no habeas corpus proceedings or appeal were pending.

It is worth noting that Petitioner in the court below placed no reliance upon 28 U.S.C. §2251.

In truth, there is authority for the proposition that 28 U.S.C. §2251 applies only to the stay of state court judicial proceedings, not to the service or execution of state sentences. *Kleczka v. Massachusetts*, 259 F.Supp. 462 (D.C. Mass. 1966). This view is strengthened by the specific language of §2251, which provides that a stay entered under its auspices has the effect of voiding any further state court proceeding.

Nevertheless, if 28 U.S.C. §2251 indeed provides the proper focus of analysis, its statutory predecessor provided for an automatic stay of execution pending appeal:

> [P]ending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained or his or liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.

14 Stat. 386 (codified at Rev. Stat. §766, 2d ed. 1878). *See, Rogers v. Peck*, 199 U.S. 425, 436 (1905); *Lambert v. Barrett*, 159 U.S. 660, 662 (1895).

Because the revision of this statute as 28 U.S.C. §2251 fails to provide for an automatic stay of execution, Congress has evinced the intent that such stays not be automatic.

Regardless of the outcome of the arguments concerning the *precise* standard for the granting of a certificate of probalbe cause to appeal as compared to the *precise* standard for the granting of an injunction pending appeal, whether under Rule 8 or §2251, it is nevertheless clear that the former requires a lesser showing than the latter. Obviously, there are cases where a petitioner may satisfy the lesser burden but not the greater. Because Congress has failed to provide that the outcome of these cases should be different where a death sentenced habeas corpus petitioner is the movant, plainly the legislative intent is that there is no entitlement to a stay of execution in a case like his.

B. This Court's Important Authorities Support the Proposition that the Granting of a Certificate of Probable Cause Should Not Entitle a Death Sentenced Habeas Corpus Petitioner to an Automatic Stay of Execution Pending Appeal.

Regardless whether the proper focal point of analysis is Rule 8, Federal Rules of Appellate Procedure, or 28 U.S.C. §2251, plainly the nature of the relief effectively afforded under either provision is an injunction against the execution of orders entered by the state judiciary. Such injunctive relief is a serious incursion upon the state judicial process, evoking many of the concerns expressed in *Younger v. Harris*, 401 U.S. 37 (1971), and other pronouncements of the Court. The standard announced by the Fifth Circuit in *O'Bryan v. Estelle*, 691

F.2d 706 (5th Cir. 1982), and followed in *Barefoot v. Estelle*, 697 F.2d 593 (5th Cir. 1983), seems appropriate in either circumstance.

That standard, and the procedures which implemented it in the Fifth Circuit, also seems appropriate in light of this Court's pronouncements on the subject. In *Nowakowski v. Maroney*, 386 U.S. 542 (1967), the Court held that an appeal proceeding after the issuance of a certificate of probable cause cannot be aborted by the denial of leave to appeal in *forma pauperis*. An indigent habeas petitioner must be afforded the same rights as a non-indigent petitioner. In *Carafas v. LaVallee*, 391 U.S. 234 (1968), the Second Circuit Court of Appeals dismissed an appeal in one sentence after a certificate of probable cause had been granted. This Court held:

Although *Nowakowski* does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous, enough must appear to demonstrate the basis for the court's summary action.

Carafas v. LaVallee, 391 U.S. at 242.

Finally, in *Garrison v. Patterson*, 391 U.S 464 (1968), the district court denied a certificate of probable cause to appeal but granted a temporary stay of execution. After receiving a three page document requesting a further stay of execution, the Tenth Circuit issued an order granting the certificate of probable cause and, "in the next sentence, affirming the District Court's denial of habeas corpus." *Garrison v. Patterson*, 391 U.S. at 465. This Court reversed:

> Carafas requires the Courts of Appeals to give sufficient indication that an appeal has been disposed of on the merits, but nothing in

> *Nowakowski* and nothing we say here prevents the Courts of Appeals from considering the questions of probable cause and the merits together, and nothing said there or here necessarily requires full briefing and oral argument in every instance in which a certificate is granted. We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted, the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited. Within this general framework, the promulgation of specific procedures is a matter for the Courts of Appeals.

Garrison v. Patterson, 391 U.S. at 466-67.

In this case, the procedures followed by the Fifth Circuit complied with all these requirements. First, Petitioner had a full opportunity to brief and orally argue the merits of his case. He alleges that after the Texas Court of Criminal Appeals denied his final application for writ of habeas corpus and stay of execution on December 21, 1982, he was not notified until January 7, 1983.[4] (Brief for Petitioner at 3). He filed his application for stay in the Fifth Circuit on January 14, 1983. On January 17, the court scheduled oral argument on the application for January 19. He complains that this amounted to inadequate opportunity to brief and argue the merits of his case (Brief for Petitioner at 25).

Such a contention is meritless. Petitioner chose to present two issues supporting his motion for stay: the use of hypothetical questions posed to expert witnesses at the punishment phase of his trial, and the allegedly per-

4. Nothing in the record supports this assertion.

jurious testimony of a witness at his trial, Mary Richards. The former of these issues had been briefed on his direct appeal to the Texas Court of Criminal Appeals; in this Court on a petition for writ of certiorari seeking a reversal of that judgment; in one of his state habeas corpus applications; and extensively in the federal district court below. Obviously this issue has been fully briefed on numerous occasions.

The allegedly perjurious testimony of Mary Richards was a new issue, but Petitioner was aware of it on December 27, 1982, when, without informing or giving notice to Respondent's counsel, he took the deposition of Richards in Austin, Texas. Briefs upon the motion for stay of execution were filed in the Fifth Circuit on January 18, 1983. Accordingly, Petitioner had twenty-two days to prepare the substance of his argument regarding this witness. Petitioner was also free to present any other issues previously presented to the district court, all of which had been previously extensively briefed. There is, therefore, no substance to the assertion that Petitioner was deprived of any opportunity to fully brief any issue he desired.

Second, Petitioner had ample notice of the procedures employed by the Fifth Circuit. First, since he cited no other authority, he was presumably proceeding under Rule 8, Federal Rules of Civil Procedure. If so, he was bound to know that he was not entitled to a stay of execution unless he could meet the burden of showing a substantial case on the merits involving a serious legal question. He was bound to know, that he, like other appellate litigants, must bear the risk of the mooting of his appeal if he is unable to obtain a stay pending appeal. *See, 11 Wright & Miller, Federal Practice and Procedure,* §2905 at 325 *et seq.* (1973); 9 Moore's Federal Practice, para. 208.07 at 8-26 et seq. (2d ed. 1982). He was bound to know that such a result would no more unfairly obliterate his right of appeal than it unfairly obliterates the right of appeal of any other appellant who suffers irreparable injury and the mooting of his appeal by virtue

of his failure to convince the court of appeals that he presents a substantial question for review.

If this was not enough, then Petitioner was bound to know that the Fifth Circuit in *O'Bryan v. Estelle, supra*, had announced that a death sentenced habeas corpus petitioner must present a substantial issue with a reasonable likelihood of success on the merits in order to obtain a stay of execution. The same standard was applied in *Brooks v. Estelle*, 697 F.2d 586 (5th Cir. 1982). The Fifth Circuit's action in *Brooks* was upheld by this Court in *Brooks v. Estelle*, 51 U.S.L.W. 3469 (U.S., Dec. 6, 1982).

Third, the Fifth Circuit specifically informed Petitioner that he should fully brief any issue he believed might support a stay of execution, and that at oral argument he would be allotted unlimited time to present any issue he believed would support a stay. In fact, at oral argument, over Respondent's protest, he was allowed to argue the issue pertaining to the knowing use of perjured testimony by the prosecution, which was not an issue that could be presented for appeal because it had not been presented to the district court. [5]

Following oral argument, the judges of the Fifth Circuit sequestered themselves before rendering an opinion the following day. The court used varying, but similar, language at various points in the opinion denying the motion for stay. The court stated that Petitioner had failed to present "a substantial case on the merits of any serious legal question." *Barefoot v. Estelle*, 697 F.2d 593, 595 (5th Cir. 1983); JA 17. The court stated that it had found "no constitutional imperfections of substance." (*Id.*). Finally, the court concluded:

> Finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that the motion for stay should be DENIED.

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5. The Fifth Circuit follows the common practice that an issue not presented in district court cannot be presented for the first time on appeal. *E.g.*, *Miller v. Turner*, 658 F.2d 348, 350 (5th Cir. 1981); *Page v. United States Parole Commission*, 651 F.2d 1083, 1087 (5th Cir. 1981).

Barefoot v. Estelle, 697 F.2d at 600; JA 26.

The standard applied by the Fifth Circuit in Petitioner's case is not demonstrably different from the standard it has applied in other cases or the standard applied by other Courts of Appeals in death penalty cases. In *O'Bryan v. Estelle*, 691 F.2d 706 (5th Cir. 1982), the Fifth Circuit granted a stay of execution, finding that a substantial question was raised in the appeal, and that the court was unable to give the question adequate review in the three days remaining before O'Bryan's scheduled execution. Similarly, in *Brooks v. Estelle*, 697 F.2d 586, 588 (5th Cir. 1982), the Fifth Circuit denied a stay of execution "because there was no substantial question concerning the correctness of the district court's judgment."

Recently in *Mulligan v. Zant*, 531 F.Supp. 458 (M.D. Ga. 1982), a district court adopted and utilized the "substantial likelihood of success" test in denying an eleventh-hour application for stay of execution. Because the court found "no substantial likelihood" that the petitioner was entitled to federal habeas relief, the stay of execution was denied. In *Shaw v. Martin*, 613 F.2d 487 (4th Cir. 1980), the Eleventh Circuit stated that a "facial showing" of the substance of a claim presented was necessary in order to justify a stay. Indeed, in cases where federal courts have granted stays of execution pending appeal, in each, substantial questions have been identified. *E.g., Booker v. Wainwright*, 675 F.2d 1150 (11th Cir. 1982); *Goode v. Wainwright*, 670 F.2d 941 (11th Cir. 1982); *Foster v. Strickland*, 515 F.Supp. 22 (N.D. Fla. 1981); *Modesto v. Nelson*, 296 F.Supp. 1375 (N.D. Cal. 1969); *see also, United States v. Restro*, 529 F.Supp. 579 (W.D. Pa. 1982).

In other cases, a court of appeals has concluded that it had inadequate time to determine whether a substantial issue were presented. For example, in *Dobbert v. Strickland*, 670 F.2d 938, 940 (5th Cir. 1982), the court said:

> It was apparent to the Court that a responsible review of the district court proceedings could not be accomplished prior to the scheduled time for execution of sentence.

Because the court had inadequate time to make that determination, a stay was granted.

The Fifth Circuit did not apply, and Respondent does not advocate, any different standard in this or other death penalty cases. If there is inadequate time for a court of appeals to conclude in good faith that no substantial issue is presented in support of a motion for stay of execution, then the motion should be granted. Although the dilatory filing of a motion for stay of execution might be grounds for censuring or otherwise disciplining a petitioner's counsel, Respondent does not aver that it is a basis for denying a motion for stay. Also, if a court of appeals entertains a reasonable judicial doubt as to the possible outcome of an issue on the merits, a stay should be granted. If not, however, the granting of a stay appears as a useless judicial act of wasteful futility. The burden Respondent asks the Court to place upon death sentenced habeas petitioners is not a heavy one. If it cannot be met, then there is no reason to defeat society's mandate and delay the inevitable.

C. Considerations of Logic and Equity Militate Against the Granting of Automatic Stays of Execution to Death Sentenced Habeas Corpus Petitioners who have Obtained Certificates of Probable Cause to Appeal.

It is first suggested that the states have little or no interest in expeditiously carrying out executions that have been ordered as a result of state judicial proceedings culminating in multiple determinations that no constitutional error infects the defendants' trials. (Brief of Amicus Curiae American Bar Association at 23). Respondent strongly contests this suggestion. In death penalty cases, more than any other, delay defeats justice. Petitioner stands convicted of a capital offense committed almost five years ago. Since then, the validity of his conviction and sentence have been in constant litigation. The merits of Petitioner's claims have been before state and federal courts for full review no fewer than eight times. Petitioner's execution previously has been stayed to permit full litigation of his claims. The merits of Petitioner's grounds for federal habeas corpus relief were extensively briefed by the parties in the district court and in the court of appeals. The district court conducted a full and fair evidentiary hearing to enable Petitioner to support any evidence and argument

in support of his claims. Following the hearing and submission of proposed findings of fact and conclusions of law by the parties, the court issued an extensive opinion, discussing in detail each claim raised by Petitioner.

The State of Texas has a substantial interest in bringing these proceedings to a close, and in the enforcement of its valid and lawful judgment. Further unnecessary delay now diminishes any deterrent effect the death penalty might otherwise have. It erodes public confidence in the judiciary, and promotes the view that the law cannot be carried out. Delay is a pernicious influence in the law, and never more so than in death penalty cases.

Petitioner and the American Bar Association as amicus curiae lament the last minute legal flurries that exert unfortunate strains upon the state and federal judicial systems, as well as counsel on both sides. Respondent also regrets this reality, but respectfully submits that it is unavoidable. At some point, executions will be carried out. It is more than a little fatuous to suggest that last minute legal flurries will not occur if the Court will but grant Petitioner's request and establish, as a matter of law, that a stay of execution is automatic upon a death sentenced habeas corpus petitioner's first journey through the federal appellate habeas corpus system. Petitioner cannot seriously suggest that if he is granted such a stay during his first set of appeals, that he will sit quietly by thereafter and make no efforts at the last minute to stop his execution after his first set of appeals has been concluded. Mr. Justice Rehnquist has addressed the problems:

> There may be good reasons for the delay, but there is also undoubtedly what Mr. Justice Holmes referred to in another context as a "hydraulic pressure" which is brought to bear upon any judge or group of judges and inclines them to grant last minute stays in matters of this sort just because no mortal can be totally satisfied that within the extremely short period of time by such a late filing he has fully grasped the contentions of the parties and correctly resolved them.

Evans v. Bennett, 440 U.S. 1301, 1307 (1979). Petitioner presents no plan to avoid these unfortunate pressures; he seeks only to postpone them as long as possible.

Finally, there is good reason to believe that justice is promoted, not defeated, by undergoing such pressures now rather than later. In the instant case, for example, the issue pertaining to the allegedly perjurious trial witness, Mary Richards, surfaced only after the execution of Petitioner became imminent. It was only then that Richards came forward and offered herself to Petitioner's attorneys. Fortunately, the matter has now been wholly resolved, following an evidentiary hearing held in district court. *Barefoot v. Estelle*, No. W-83-CA-53 (W.D. Tex. 1983). If Petitioner's execution had not been imminent, however, the matter would have lain quietly for an indeterminate additional period of time. Obviously passage of time in the face of claims such as this renders more difficult the ascertainment of truth.

Respondent suggests that there are many ameliority effects of proceeding as swiftly as possible to justice, without compromising the quality of that justice. Those considerations further support Respondent's contention that stays of execution should not be automatic in death penalty cases merely because the petitioner has secured a certificate of probable cause to appeal.

II. PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW BY THE USE OF HYPOTHETICAL QUESTIONS POSED TO EXPERT PSYCHIATRIC WITNESSES AT THE PUNISHMENT PHASE OF HIS BIFURCATED CAPITAL TRIAL.

A. The Texas Statutory Scheme and the Court's Prior Pronouncements Illustrate the Appropriateness of Expert Psychiatric Testimony at the Punishment Phase of a Texas Capital Murder Trial.

In capital cases, like all criminal cases, Texas follows a bifurcated procedure in which there are separate guilt or innocence and punishment stages of trial. Tex. Code Crim. Proc. Ann. arts. 37.07, 37.071. Article 37.071

deals specifically with the procedure to be followed during the punishment stage of a capital trial. After the defendant has been convicted of capital murder under Tex. Penal Code Ann. §19.03, the trial proceeds under Article 37.071 to determine whether the defendant will receive the sentence of life imprisonment or death. At the close of the punishment hearing, three special issues are submitted to the jury. The first relates to whether the defendant's conduct that caused the death of the deceased "was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." The second relates to whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The third, submitted to the jury only if raised by the evidence, inquires whether the conduct of the defendant in killing the deceased "was unreasonable in response to the provocation, if any, by the deceased."

The prosecution must prove each issue beyond a reasonable doubt, and the jury is required to return a special verdict of "yes" or "no" on each issue submitted. The jury may not answer "yes" unless it agrees unanimously, and it may not answer any issue "no" unless ten or more jurors agree. If the jury returns an affirmative finding on each issue, the trial court must sentence the defendant to death, but if the jury returns a negative finding on any of the issues, the court must sentence the defendant to life imprisonment in the Texas Department of Corrections. Article 37.071 also provides for automatic review by the Texas Court of Criminal Appeals upon any conviction and sentence of death.

This Court upheld this statutory scheme in *Jurek v. Texas*, 428 U.S. 262 (1976). The Court there rejected the argument that requiring the jury to predict future behavior "is so vague as to be meaningless." Jurek at 274. The Court had no occasion to enumerate specifically the nature of the evidence the jury might appropriately hear, but the Court was unequivocal in its conclusion that a jury is capable of making such a determination reliably:

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.

Jurek at 276. Specifically regarding the prediction of future dangerousness, the Court held:

> [P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. (footnotes omitted)

Jurek at 275-76.

The Court spoke more directly to the issue of psychiatric testimony at the sentencing stage of the Texas capital trial in *Estelle v. Smith*, 451 U.S. 454 (1981). The Court disapproved of the use of such testimony when based upon an interview with the defendant without prior notification to defendant's counsel and with no appropriate warnings to the defendant under *Miranda v. Arizona*, 384 U.S. 463 (1966). The Court added, however:

> "[U]nder the Texas capital sentencing procedure the inquiry necessary for the jury's resolution of the future dangerous issue is in no sense confined to the province of psychiatric experts."

451 U.S. at 473. The Court continued:

> "While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness the holding in *Jurek* was

> guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts."

Id.

It bears emphasis that the import of Petitioner's position, combined with the holding in *Estelle v. Smith*, is to bar the prosecution from ever presenting psychiatric testimony at the punishment phase of Texas capital trials. Under *Estelle v. Smith*, the state cannot compel the defendant to submit to a psychiatric examination for the purpose of assessing his future dangerousness, possibly even where the defendant himself presents such testimony. *Estelle v. Smith*, 451 U.S. at 466 n.10, 468, 472. And if a mental health professional cannot testify upon the basis of hypothetical questions, "we would be giving the defendant the right to prevent any and all psychiatric testimony on the issue of dangerousness except psychiatric testimony in his own favor." *Barefoot v. Estelle*, 697 F.2d at 598; JA 22.

B. Expert Predictions of Future Dangerousness are Reliable in Cases Such as Petitioner's.

Respondent recognizes the special need for reliability of evidence presented at the punishment phase of a capital trial. *E.g., Green v. Georgia*, 442 U.S. 95 (1979); *Gardner v. Florida*, 430 U.S. 349 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976). [6] Based upon evidence presented at the evidentiary hearing in district court, both the district court and the court of appeals found that psychiatric predictions of future dangerousness are reliable under circumstances presented in this case. This Court has no basis to hold such findings clearly er-

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6. The holding in these cases provide scant support for Petitioner. In Green, important evidence was withheld from the jury's consideration. In Gardner, the defendant was deprived of any opportunity to confront or rebut a confidential pre-sentence investigation report. Similarly, in *Holloway v. State*, 613 S.W.2d 497 (Tex.Crim.App. 1981)(*en banc*), the defendant was effectively deprived of any opportunity to rebut the hearsay basis of an expert's non-hypothetical testimony. In this case, the complete foundation of the expert hypothetical testimony was revealed to the jury; the defense was unfettered in its cross-examination, and was given every opportunity to present impeaching and rebuttal evidence.

roneous under Rule 52, Federal Rules of Appellate Procedure. [7]

The fallacy in Petitioner's position is apparent. Studies attempting to predict future behavior generally and future dangerousness specifically have frequently been unsuccessful. Many of these studies were discussed at the evidentiary hearing. [8] (R. 194-204). It has indeed proven difficult to predict future dangerousness among any segment of the population that does not have a repetitive pervasive history of past violence. [9] The American Psychiatric Association recognized this distinction years ago in its amicus curiae brief filed in this Court in *Estelle v. Smith*, 451 U.S. 454 (1981):

> "In some circumstances, of course, a clinician might be fairly confident that violent behavior would recur, as for example where a parent's past behavior clearly and repetitively evidences physical abuse of his or her children. But, as the Task Force noted, the relatively high degree of reliability in these cases is a function of knowing that base rate of such behavior that is, *the rate of repetitive past violent acts* — is very high for the person under scrutiny." (emphasis added)

Amicus curiae brief of American Psychiatric Association in *Estelle v. Smith*, No. 79-1127, at 13.

7. Cf *Buttrum v. Georgia*, _____U.S._____, 103 S.Ct. 801, 802 (1983), in which Mr. Justice Marshall dissented to the denial of certiorari and stated, "It is well recognized that predictions of violent behavior are generally unreliable even under the best of circumstances." Even so, Mr. Justice Marshall would have granted certiorari because the only testimony presented by the prosecution at the penalty stage of trial was non-hypothetical expert testimony "that was based in substantial part on hearsay statements that were not in evidence ... and were not subject to cross-examination." Id. The testimony in this case suffers none of these defects.

8. *E.g.*, Steadman & Cocozza, "The Dangerousness Standard and Psychiatry: A Cross National Issue in the Social Control of the Mentally Ill." (1980).

9. This same difficulty is apparent in the studies discussed in J. Cocozza & H. Steadman, "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence," 29 Rutgers L. Rev. 1084 (1976), relied upon by Petitioner.

This view was echoed at the evidentiary hearing. The leading thinker in this field was conceded to be Professor John Monahan and the leading work, Monahan's monograph, *The Clinical Prediction of Violent Behavior* (1981). Monahan states repeatedly in that work that where there are repetitive past acts of violence, prediction of future violent behavior becomes increasingly more reliable. In his preface, Monahan wrote:

> "At several points in its gestation, *The Clinical Prediction of Violent Behavior* had a subtitle. When I was beginning the monograph, it was 'Why You Can't Do It.' About half way through writing it, I changed the subtitle to 'How To Do It And Why You Shouldn't.' By the time I was finished, I was toying with 'How To Do It And When To Do It.' The development of my thinking on the prediction of violence is reflected quite well in these changes: from an empirical distaste for the task, to an ethical aversion to engaging in it, to a reluctant concession that there may be circumstances in which prediction is empirically possibly and ethically appropriate."

The Clinical Prediction of Violent Behavior at v.

Those circumstances include persons such as Petitioner:

> "[T]here is a growing body of empirical evidence suggesting that, for the small group of *habitually violent persons*, the probability of future violence is raised considerably."

(emphasis in original) *Id.* at 14-15. Moreover, "If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each prior criminal act." *Id.* at 71.

Finally, Monahan wrote:

> "If the base rate of violent behavior in a given population is very low, prediction becomes an extremely difficult task. As Megargee (1976, p. 18) has it, '(m)ental health professionals should limit themselves to predicting dangerous behavior in high base-rate populations such as those who have already engaged in repeated violence."

Id. at 87. Thus, the plethora of studies purporting to

prove that future violence cannot be reliably predicted have failed to select as a sample persons with high rates of past repetitive violent behavior. [10] As the district court found:

> "The majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises. The accuracy of this conclusion is reaffirmed by the expert medical testimony in this case at the evidentiary hearing. Dr. George Parker, a psychologist, testified for Respondent that professional literature indicates that predicting future dangerousness among random mental patients or even felons generally is not terribly accurate. The prediction of future dangerousness, however, becomes easier as the pattern and history of violence becomes more repetitively persuasive."

(JA 13).

This finding was upheld on appeal by the Fifth Circuit:

> "The evidence before the federal district court supported its conclusion that the accuracy of psychiatric predictions of future dangerousness dramatically rises where there has been a pattern of repetitive assaultive and violent conduct. The majority of psychiatric experts accept that view."

Barefoot v. Estelle, 697 F.2d at 596; JA 20.

The facts of the hypothetical question presented such a history. It is shown first through the extensive testimony from witnesses in numerous communities in

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10. Two studies discussed at the evidentiary hearing (R. 197, 201) as more successfully predicting future violence by virtue of selection of such a pool sample are Shah, "Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology," 33 Am. Psych. 224 (1978), and Rofman, Askinazi, & Fant, "The Prediction of Dangerous Behavior in Emergency Civil Committment," 137 Am.J.Psych. 9 (1980). Another, Steadman, Cocozza & Melick, "Explaining the Increased Crime Rate of Mental Patients: The Changing Clientele of State Hospitals," 135 Am.J.Psych. 816 (1978), is cited in support of this identical proposition in the amicus curiae brief at 14-15 n.9 filed by the American Psychiatric Association in this case.

five states that Petitioner's reputation was bad for being a peaceful and law abiding citizen, a reputation that can only evince repeated, widespread acts of criminal violence. His criminal history contained evidence of acts of violence or potential violence, such as unlawfully carrying illegal weapons. The history is accentuated by the circumstances of the crime itself, involving arson, attempted robbery and murder.

Accordingly, it is not surprising that all four experts at the federal evidentiary hearing comfortably predicted that Petitioner would continue to commit future acts of violence posing a danger to society. Their certainty ranged from somewhat less than ninety percent [11] to not quite so high as one hundred percent. Indeed, in Professor Dix's article heavily relied upon by Petitioner, he stated that an antisocial sociopath is "aggressively hostile toward the established mores of the community and often works out his hostility by taking what he wants when he wants it, without regard for his victim," G. Dix, "The Death Penalty, Dangerousness, Psychiatric Testimony, and Professional Ethics," 5 Am.J.Crim.Law 151, 186-88 (1977), *citing* Kozel, Boucher, and Garofalo, "The Diagnosis and Treatment of Dangerousness," 18 Crim. & Delinq. J. 371, 380 (1972).

C. The Probative Value of the Expert Testimony in Petitioner's Case was not Outweighed by any Prejudicial Impact.

Petitioner and the American Psychiatric Association as *amicus curiae* also argue that the prejudicial impact of such testimony, presumably even assuming its reliability, outweighs it probative value because it is impossible to cross-examine effectively psychiatric experts. This argument is meritless. There are numerous texts upon the proper modes of cross-examination of ex-

11. One commentator has suggested that psychiatric testimony must be at least approximately ninety percent certain to support a verdict where the applicable evidentiary standard requires proof beyond a reasonable doubt. Brooks, "The Dangerous Patient: Legal Aspects," Feb. 24, 1976 (paper presented at the New York School of Psychiatry's Law and Public Policy Workshop, Poughkeepsie, N.Y.), cited in *Cocozza & Steadman*, supra, at 1084 n.1; Stone, "Comment," 132 Am.J.Psych. 829, 831 (1975).

pert witnesses; all apply equally to the kind of expert testimony presented in this case. *See, e.g*, D. Schwartz, "The Proper Use of the Psychiatric Expert", in *Scientific and Expert Evidence*, (ed. by E. Imwinklerid, 2d ed. 1981) at 1219, 1237-45. Indeed, virtually every criticism of such expert testimony set forth in the briefs of Petitioner and the various *amici curiae* either was or could have been presented at trial in Petitioner's case.

The view has also been expressed that it is impossible to present effective rebuttal testimony where the nature of such rebuttal testimony would not be that the prosecution's experts have erred in their diagnosis, but that no such proper diagnosis is medically possible. Respondent is mystified by this criticism. It would seem much easier, not more difficult, to persuade a jury that expert testimony is not credible where the contrary evidence shows not merely that the experts' testimony is wrong, but, as Professor Dix has suggested, that it stands upon the brink of quackery. G. Dix, "The Death Penalty, 'Dangerousness,' Psychiatric Testimony and Professional Ethics," 5 Am.J.Crim.L. 151, 172 (1977).

Petitioner is equally wrong in stating that he could not have impeached or rebutted the experts' testimony by showing "that Barefoot was married, had children, loved his family and they him, when to church, graduated from high school or had friends." Brief for Petitioner at 38. These are precisely the sorts of social institutional ties that both experts at trial testified would militate against their opinion (SF 2092-93, 2097-99, 2128-29). Petitioner, however, presented no such evidence, presumably because it did not exist, and so was unable to impeach the experts upon this basis. Thus, Petitioner had every opportunity to present in this context all of the mitigating evidence that he now erroneously asserts he could not present.

Petitioner relies heavily upon *People v. Murtishaw*, 631 P. 2d 446 (Calif. 1981)(*en banc*), as supporting his position. In fact, it supports Respondent's. First, the California Supreme Court recognized the validity of predictions of future dangerousness in cases such as Petitioner's:

> A reliable prediction might also be conceivable if the defendant had exhibited a long-continued pattern of

> criminal violence such that any knowledgeable psychiatrist would anticipate future violence.

People v. Murtishaw, 631 P.2d at 470. Second, the court found that the prejudicial impact of such testimony outweighed its probative value under the California statutory scheme, where a determination of future dangerousness "is at best only marginally relevant to the task at hand." *Id.* at 469. Under the Texas statutory scheme, which is quite different, such testimony is highly relevant to the special issues the jury must determine. [12]

Finally, the court was willing to find prejudicial error where the "jury deliberated two full days before deciding on the death penalty, suggesting that the issue of penalty was close." *Id.* at 471. The jury in Petitioner's trial deliberated at most one hour before returning a verdict of death.

Accordingly, there is no good reason to treat the expert testimony in this case differently from expert testimony in other cases. There is no reason to depart from the well recognized rule that the use of expert testimony is ordinarily a matter of state evidentiary law. J. Wigmore, Treatise on Anglo-American System of Evidence in Trials at Common Law, §6e (3d ed. 1940). Under the Federal Rules of Evidence, admission of expert testimony is governed by R. 701 *et seq.*, Federal Rules of Evidence. The annotations to that rule contain extremely few reversals, even on direct appeal, for erroneously admitted expert testimony. It follows that a finding of constitutional error at a state trial upon the same basis should be even more difficult. As the district court succinctly stated:

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12. Respondent is puzzled by Petitioner's emphasis upon the special importance of future dangerousness in the Texas statutory scheme as compared to those of other jurisdictions. Brief for Petitioner at 31-34. This importance proves the relevance and probative value of expert testimony upon future dangerousness and increases the degree of prejudice Petitioner must show in order to exclude such testimony.

[I]t is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal. If the state's psychiatrists at trial erred in being over confident as to their diagnosis of Petitioner, then Petitioner should have presented impeaching evidence or rebuttal testimony.

(JA 14).

CONCLUSION

For these reasons, Respondent respectfully prays that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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